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Supreme Court, U.S.
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In The

Supreme Court of the United States

STEVE HERRERA, et al.,

Petitioners,

v.

ERNESTO G. LIRA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Prison Litigation Reform Act, which mandates that "no action shall be brought" by an inmate to challenge prison conditions under federal law unless the inmate has exhausted his available remedies, requires a district court to dismiss an entire action without prejudice if it contains both exhausted and unexhausted claims.

PARTIES TO THE PROCEEDING

Petitioners are the following officials from the California Department of Corrections and Rehabilitation: Steve Herrera, Brian Fielder, Weldon J. Olmstead, Edward S. Alameida, Jr., Donald R. Busser, Jose Chavez, Darlene Best-Pizzella, John D. Stokes, Cheryl Bolles, B. Heaps, Allen K. Scribner, C. Patten, Darin W. Bradbury, J. Briddle, Matt Nimrod, Donald D. Bruce, K. Cruse, and M. Piland. The Respondent is Ernesto G. Lira.

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PETITION FOR WRIT OF CERTIORARI

Steve Herrera and the other named Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005) (Reinhardt, Thompson, Berzon, JJ). Pet. App. 1-27. The district court's order is not reported. Pet. App. 28-39.

JURISDICTION

The court of appeals issued its opinion on November 1, 2005 (Pet. App. 1-27) and denied a timely petition for rehearing on December 13, 2005 (Pet. App. 41). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under the Prison Litigation Reform Act (PLRA), "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

STATEMENT

This case concerns the statutory interpretation of the PLRA's exhaustion requirement, 42 U.S.C. § 1997e(a). It is clear that inmates must exhaust their available administrative remedies before filing any prison-conditions suit, regardless of the relief they seek or the type of conditions challenged. *Porter v. Nussle*, 534 U.S. 516 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). But the circuit courts sharply disagree about how federal courts should dispose of inmate suits containing both exhausted and unexhausted claims.

In this case, inmate Ernesto G. Lira filed an action containing both exhausted and unexhausted claims. Mr. Lira, who is incarcerated by the California Department of Corrections and Rehabilitation, was placed in segregated housing because he was identified as a prison-gang associate and his presence in the general population was deemed a threat to the safety of staff and inmates. Pet. App. 29. Mr. Lira submitted three administrative grievances regarding the allegations in his complaint, but he admits that he only took one of the administrative grievances to the final level of review. Pet. App. 30. The single exhausted grievance concerned Mr. Lira's original placement in segregated housing. Pet. App. 30.

In 2000, Mr. Lira filed this civil-rights action, alleging multiple due-process claims arising out of his prison-gang status, his segregated housing, and his retention in segregated housing. Pet. App. 28-29. Mr. Lira's allegations span over four years at two different institutions and concern eighteen served defendants at the two prisons. Pet. App. 28-30. The district court found that Mr. Lira's sole exhausted administrative grievance was limited to his

placement in segregated housing. Pet. App. 34-36. Because Mr. Lira did not exhaust his administrative remedies for all of his claims in this action before filing suit, as required by § 1997e(a), the district court dismissed the case without prejudice. Pet. App. 34-36. Mr. Lira timely appealed the district court's order.

The Ninth Circuit reversed the district court's dismissal by holding that the proper treatment of a mixed action depends on the relatedness of the claims contained in the complaint. Pet. App. 23-27. The court of appeals held that if the claims are not intertwined, the unexhausted claims should be dismissed; if the claims are closely related and difficult to untangle, the defective complaint should be dismissed with leave to amend to allege only exhausted claims. Pet. App. 23-26. The court of appeals remanded the action back to the district court for further proceedings consistent with the court's holding. Pet. App. 26-27.

The court of appeals acknowledged a direct conflict with the decisions of other courts of appeals on the precise issue presented. Pet. App. 12-13. Including the Ninth Circuit, the circuits are split four ways over how to address inmate actions containing both exhausted and unexhausted claims. The Sixth and Tenth Circuits require district courts to dismiss the entire action without prejudice. *Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005); *Ross v. Bernalillo*, 365 F.3d 1181 (10th Cir. 2004). The Second Circuit requires district courts to dismiss only the unexhausted claims. *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1398 (2005). And the Eighth Circuit allows district courts to dismiss the complaint with leave to amend so that the inmate can cure any defect in

the action. *Kozohorsky v. Harmon*, 332 F.3d 1141 (8th Cir. 2003).

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN CONFLICT WITH EACH OTHER OVER WHETHER THE PRISON LITIGATION REFORM ACT REQUIRES AN ACTION TO BE DISMISSED IN ITS ENTIRETY WHEN IT CONTAINS BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS.

The Sixth and Tenth Circuits each hold that the PLRA's exhaustion statute requires an action containing both exhausted and unexhausted claims to be dismissed without prejudice. *Bey v. Johnson*, 407 F.3d 801, 809 (6th Cir. 2005); *Ross v. Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004). These circuits base their holdings primarily on the plain meaning of the statute, in that § 1997e(a) prohibits inmates from filing unexhausted *actions*, rather than just unexhausted *claims*. 42 U.S.C. § 1997e(a); *Bey*, 407 F.3d at 807; *Ross*, 365 F.3d at 1190. These circuits also reason that a dismissal rule supports Congress's goals in enacting the statute by encouraging inmates to make full use of the grievance process and giving prison officials the opportunity to resolve complaints internally before an inmate files suit in court. *Bey*, 407 F.3d at 807; *Ross*, 365 F.3d at 1190. And both circuits hold that a rule requiring dismissal without prejudice creates comity between 42 U.S.C. § 1983 claims and habeas-corpus claims. *Bey*, 407 F.3d at 807-08; *Ross*, 365 F.3d at 1189.

In direct conflict with the Sixth and Tenth Circuits, the Second Circuit holds that only the unexhausted claims

must be dismissed from an action containing both exhausted and unexhausted claims. *Ortiz*, 380 F.3d at 663. Contrary to the Sixth and Tenth Circuits, the Second Circuit holds that the statute's language is not dispositive and is too ambiguous to require district courts to dismiss an entire action if there is one unexhausted claim. *Id.* at 656-58. And unlike the Sixth and Tenth Circuits, the Second Circuit holds that congressional policies are not achieved through dismissal of an action in its entirety and that analogy to this Court's habeas-corpus precedent is misplaced. *Id.* at 658-62.

The Eighth Circuit takes a third approach. Like the Sixth and Tenth Circuits, the Eighth Circuit holds that "the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000). Yet instead of requiring dismissal of the entire action, the Eighth Circuit holds that a district court should allow an inmate to amend his complaint to include only exhausted claims. *Kozohorsky v. Harmor* 332 F.3d 1141, 1144 (8th Cir. 2003).

As a fourth approach, borrowing in part from the Second and Eighth Circuits and in direct conflict with the Sixth and Tenth Circuits, the Ninth Circuit below holds that the proper treatment of a mixed action should depend on the relatedness of the claims contained in the complaint. Pet. App. 23-26. "When a plaintiff has filed a 'mixed' complaint and wishes to proceed with only the exhausted claims, a district court should simply dismiss the unexhausted claims when the unexhausted claims are not intertwined with the properly exhausted claims." Pet. App. 23. On the other hand, "when a plaintiff's 'mixed' complaint includes exhausted and unexhausted claims

that *are* closely related and difficult to untangle, dismissal of the defective complaint with leave to amend to allege only fully exhausted claims, is the proper approach." Pet. App. 24 (italics in original).

This Court's guidance is needed to resolve these conflicting decisions among the circuits.

II. THE DISPUTE AMONG THE CIRCUITS IMPACTS A SUBSTANTIAL PORTION OF THE FEDERAL-COURT DOCKETS.

The issue in this case potentially impacts a great many cases before the federal judiciary. Correctional officials are subject to thousands of inmate lawsuits each year. In 2004, inmates brought over 23,000 prisoner-civil-rights and prison-condition suits against state and federal correctional officials. Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004 tb.2.2 (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf. In 2004, prisoner-civil-rights and prison-condition cases comprised over 8% of all federal civil filings. *Id.* In the Ninth Circuit, the numbers are greater than the national average. For the year ending September 30, 2004, nearly 12% of all private civil filings in the Ninth Circuit were prisoner-civil-rights and prison-conditions cases. Administrative Office of the U.S. Courts, Judicial Business of the United States Courts 2004 tbl.C-3 (2004), *available at* http://www.uscourts.gov/judbus2004/appendices/c3.pdf.

Even though these numbers are staggering, before the enactment of the PLRA, the numbers were much higher. For instance, in 1996, inmates brought over 41,000

prisoner-civil-rights and prison-condition suits against state and federal correctional officials, which comprised over 15% of the federal civil filings. Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004 tbl.2.2 (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf. These numbers demonstrate the very serious impact prisoner litigation has on the federal-court dockets.

This Court's direction is needed so that the courts of appeals throughout the federa' judiciary can act consistently and uniformly in addressing inmate actions under the PLRA. An inmate bringing a civil-rights action in one state should be treated the same in another state, yet the conflicting courts of appeals' decisions currently make this impossible. For instance, an inmate incarcerated in federal custody in one state, but who is transferred to a prison in another state, could face discrepant legal rulings depending on the circuit in which he brings his suit.

III. THE COURT OF APPEALS' DECISION CANNOT BE RECONCILED WITH THE PRISON LITIGATION REFORM ACT'S PLAIN LANGUAGE, CONGRESS'S GOALS IN ENACTING THE PRISON LITIGATION REFORM ACT, OR THIS COURT'S ANALOGOUS HABEAS-CORPUS PRECEDENT.

The court of appeals in this case has weakened the PLRA's exhaustion requirement. The court of appeals' decision conflicts with: (1) the plain meaning of the exhaustion statute; (2) the Congressional policies behind the

statute; and (3) this Court's analogous precedent in habeas-corpus proceedings.

The PLRA dictates that "[n]o *action* shall be brought with respect to prison conditions" unless the inmate has exhausted available administrative remedies. 42 U.S.C. § 1997e(a) (emphasis added). The plain meaning of this statute mandates that an inmate's action containing both exhausted and unexhausted claims be dismissed in its entirety without prejudice. The court of appeals in this case is mistaken when it holds that the PLRA's use of the term "action" does not support dismissing an action in its entirety without prejudice. Pet. App. 18. Congress demonstrated its understanding of the difference between an action and a claim by its use of terms within the PLRA. In § 1997e(c)(1), Congress provided that a court shall dismiss "any action" that is frivolous, malicious or fails to state a "claim." 42 U.S.C. § 1997e(c)(1). In the very next statutory subsection, Congress provided that a court may dismiss a "claim" if it is frivolous, malicious, or fails to state a "claim" without first requiring exhaustion of administrative remedies. 42 U.S.C. § 1997e(c)(2). "Congress's use of the word 'claims' in subsection (c)(2) indicates that 'claims' are individual allegations and 'actions' are entire lawsuits." *Bey*, 407 F.3d at 807. "Furthermore, reading subsection (a) and subsection (c)(2) together demonstrate that Congress intended for 'action' to mean 'suit.'" *Id.*

The court of appeals in this case also fails to recognize that Congress's policies dictate that actions containing both exhausted and unexhausted claims should be dismissed in their entirety without prejudice. As articulated by this Court, Congress's goals in passing the PLRA were "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Yet the

court of appeals holds that even taking policy considerations into account, dismissal of the entire action without prejudice does not advance the goals of the PLRA. Pet. App. 19-20. Congress's goals are compromised by a rule that allows exhausted claims to go forward and dismisses only unexhausted claims. This is because such a rule obviates inmates' incentives to ensure that each of their claims is exhausted before filing suit, ultimately neither reducing the quantity nor improving the quality of inmate suits. *Porter*, 534 U.S. at 524.

Dismissing an action containing both exhausted and unexhausted claims also advances Congress's goal of judicial efficiency, including further filtering out frivolous claims. *Id.* at 525. Once a court determines that one claim is unexhausted, it is then unnecessary to review each claim to determine exhaustion. On the other hand, the claim-by-claim procedure has no downside for the inmate because he will be able to file a complaint with exhausted and unexhausted claims without regard for the claims' exhaustion status, and leave the matter for the court to decipher. Dismissal without prejudice of the entire action would impose responsibility on the inmate to attempt to exhaust all claims before filing suit, rather than placing the burden on the court.

Moreover, Congress's goals are achieved by dismissing without prejudice an action containing both exhausted and unexhausted claims because such a rule reduces the burden placed on defendant prison officials. Any one prison suit may contain both exhausted and unexhausted claims. And dismissal without prejudice of mixed actions would lessen correctional defendants' burden because if they find one exhausted claim, they will be relieved from having to parse through the often-numerous remaining

claims. This is especially true in the Ninth Circuit, where a significant onus currently falls on defendant prison officials because the PLRA's exhaustion requirement is a defense that defendants must raise and prove, rather than a pleading requirement for the prisoner. *See, e.g., Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003).

Finally, an analogy to the exhaustion requirement in the habeas-corpus context supports a rule that mixed civil actions should be dismissed. As this Court held in the analogous habeas-exhaustion context under 28 U.S.C. § 2254, "[r]equiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims." *Rose v. Lundy*, 455 U.S. 509, 519 (1982). "To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review." *Id.* at 520. Contrary to the court of appeals' statement that "any analogy to habeas corpus is unpersuasive" (Pet. App. 18-19), the same exhaustion policy considerations hold true in a prisoner-civil-rights matter containing both exhausted and unexhausted claims. *See Bey*, 407 F.3d at 807-08; *Ross*, 365 F.3d at 1189.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 6, 2006

Respectfully submitted,

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427 F.3d 1164

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNESTO G. LIRA,
Plaintiff-Appellant,

v.

LT. HERRERA, M. PILAND; J. BRIDDLE; A. SCRIBNER; J. STOKES; B. HEAPS, K. CRUSE; BRUCE; FIELDER; M. NIMROD; K. MANN; D. BEST; C. PATTEN; D. BRADBURY; K.C. BOLLES; EDWARD ALAMEIDA; Asst. Warden BUSSER,
Defendants-Appellees.

No. 02-16325

D.C. No.
CV-00-00905-SI

OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
November 2, 2004 – San Francisco, California

Filed November 1, 2005

Before: Stephen Reinhardt, David R. Thompson, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

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OPINION

BERZON, Circuit Judge:

Ernesto Lira was for several years placed in administrative segregation, and later in a Special Housing Unit (SHU), because prison officials determined that he was affiliated with a prison gang and posed a threat to prison safety. He filed this suit under 42 U.S.C. § 1983, protesting that his treatment at California's Deuel Vocational Institute and Pelican Bay Prison violated due process. The district court granted defendants' joint motion for summary judgment on the ground that the sole remaining cause of action encompassed both a fully exhausted claim and some unexhausted claims. We must decide whether the district court properly construed the Prison Litigation Reform Act's ("PLRA") exhaustion requirement, 42 U.S.C. § 1997e(a).

FACTUAL BACKGROUND

Lira is a former inmate of the California corrections system. He entered the Deuel Vocational Institute (DVI) in 1995, where he was immediately "validated" as an

associate of the Northern Structure gang. "Validation" as a prison gang member is a designation reserved for prison gang members believed to pose a threat to prison safety. For Lira, the consequence of validation was placement in administrative segregation[1] at DVI and then in the Special Housing Unit ("SHU")[2] of Pelican Bay State Prison. At both institutions, Lira was locked in his cell for twenty-two and one half hours each day.

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[1] The Department of Corrections' internal regulations explain that administrative segregation, or "ad-seg," "provides secure housing upon the initial period of separation from the general population for any reason until a classification committee has determined whether the inmate's placement should be in a specialized housing unit or in the general population." Department of Operations Manual ("DOM") § 62050.10.1, *available at* http://www.corr.ca.gov/RegulationsPolicies/PDF/DOM/00_dept_ops_maunal.pdf (last visited Sept. 22, 2005). Criteria for placement in ad-seg are "limited to those cases where reasons exist that the inmate's continued presence in the general population would do any of the following: [e]ndanger the security of the institution;[j]eoparidize the integrity of a serious misconduct or criminal investigation; [e]ndanger the safety of the inmate or others." DOM § 62050.10.3.

[2] "SHUs provide secure housing for inmates whose conduct endangers the safety of others or the security of the institution." DOM § 62050.13. Internal regulations require that an inmate

> be placed in SHU if: [t]he inmate has requested segregation for their own protection and the need can be substantiated by appropriate staff; [t]he inmate is newly arrived at the institution and more information is needed to determine whether the inmate may be incompatible with any element of the general population . . . ; [t]he inmate has been found guilty of a disciplinary offense sufficiently serious to warrant confinement for a fixed term in segregation, and the term is fixed in conformance with the SHU Term Assessment Chart; [t]he inmate's continued presence in general population would severely endanger lives of inmates or staff, the security of the institution or the integrity of an investigation into suspected criminal activity.

Id. DOM § 62050.13.2.

On January 4, 1996, Lira appeared before DVI's Institution Classification Committee (ICC) for his initial review of the validation designation.[3] *See* DOM § 62050.10.6. He was told that there was "some evidence" of his membership in the Northern Structure gang, but not what the evidence was. Lira again appeared before the ICC at monthly reviews in February and March 1996 but was given no further information.

After court appearances in the spring of 1996 Lira was returned to DVI where he was placed, again, in administrative segregation. On June 27, 1996, Lira attended another ICC review of his placement, but, once more, was given no details concerning the evidence substantiating his validation as a Northern Structure gang member.

At that time, it appears, the Department of Corrections' Special Services Unit (SSU), did not have Lira's "C-file," the central file containing all documentation concerning an inmate. The C-file contained the information that formed the basis for Lira's initial administrative segregation placement. The SSU received the C-file after Lira's June 1996 review but before his July 1996 review.

On July 29, 1996, after approximately seven months of placement in administrative segregation, Lira resorted to the Department's three-level inmate grievance process to complain about his validation. A grievance is usually first considered by a prison's Appeals Coordinator and involves an interview with the inmate. *See* Cal.Code Regs.

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[3] The Department's internal regulations require initial review of ad-seg placement "within ten days of receipt in the unit." If an inmate is retained in ad-seg, the "ICC shall review the inmate at least every 30 days thereafter until the inmate is released from temporary segregation." DOM § 62050.10.6.

tit. 15, § 3084.3(a), (b). The institution's head or regional parole administrator reviews the grievance at the second level of review. *See id.* § 3084.5(c), (e)(1). Finally, a designee of the Director of the Department of Corrections hears the third formal appeal. *See id.* § 3084.5(e)(2).

Lira wrote a description of his problem on his grievance form, explaining that he had never received the evidence that constituted his validation as a Northern Structure member and arguing that he therefore could not prepare for the reviews of his placement in administrative segregation. He also represented that he had spoken with a Merced County Sheriff's Office correctional officer who had provided the prison with information about his status as a Northern Structure associate. According to Lira, the officer told him that he had reported only that Lira had been housed with the Northern Structure inmates during a prior jail sentence, not that Lira himself was in the Northern Structure gang. Lira also complained that he had made a request for information concerning his validation from the ICC but received no response. In the section labeled "Action Requested," he stated: "# 1 To be released from ad/seg and returned to [general population], # 2 remove all these 128-B from my C.D.C. file. 3. Be given a program, and left alone to do my time. I'm too old to play games, never have."

Lira received a first level response on August 22, 1996. His appeal was denied in light of the "staff belie[f] that [he] was an associate member of th[e] prison gang." Lira was told, however, that an investigation of his gang status was underway, because the July 2, 1993 document used to validate his membership in the Northern Structure gang "[did] not meet current departmental validation requirements."

Lira appealed the decision to the second level review on September 2, 1996, arguing that he was dissatisfied with the first level review because, as his first level interviewer had told him, the 1993 document used to justify his administrative segregation placement was "all wrong." Following Lira's transfer to the Pelican Bay State Prison, a second level response, denying relief, was issued, on September 27, 1996. While the second level review was pending, the SSU revalidated Lira as a gang associate, applying the then-current regulations. By the time of the second level response, the report used to validate Lira as a member of the Northern Structure gang had been reconsidered under the new regulations. Lira's second level appeal was denied on the basis that the revalidation was proper.

Lira received a copy of his C-file on October 18, 1996. He learned that his validation stemmed from information provided by a DVI correctional counselor in 1992 and 1993. The next day, Lira appealed the second level reviewer's decision on his July 29, 1996 grievance to the third level, that of the Director of the Department of Corrections. He explained his dissatisfaction as follows:

> "First of all," to this date, and many request forms later, I have not received the suppose 128 B-2 dated 9-4-96 or any other documentation relied upon to validate me as something I'm not. I am now here at [Pelican Bay State Prison] with an indeterminate SHU. These chronos inclosed is all that I have received. Directors rule 3000 defines "gangs" means to engage or have engaged on behalf of an organization in unlawful acts. I

> have no serious "115."[4] I am not satisfied and request a director's review.

The Director issued a denial of Lira's final appeal on January 24, 1997. The response memorandum summarized the issue as follows: "Whether or not the institution's denial of appellant's request to release him to the general population and remove all gang related information from his Central File (C-File) is appropriate." The Director level response indicated that Lira's continued detention in administrative segregation was appropriate because of the recent revalidation. Citing the relevant regulations, the memorandum concluded that "[t]he documentation and arguments presented are persuasive that the appellant fails to provide convincing proof that he was inappropriately removed from the general population."

Lira continued to be dissatisfied with his placement in administrative segregation. He sought and received confirmation from Merced County Sheriff's Department Correctional Officer Romero that the Merced County Sheriff's Department "cannot find any gang validation on Ernesto Lira in Merced County jail." Lira proceeded to file a second grievance on April 4, 1998, requesting "(A) immediate release from indeterminate SHU status; (B) that R. Romero's letter dated 3-8-1998 be entered into my C-File (in re: confidential section/gang status); and (C) that the 128-B dated 5-10-93 in regards to what IGI Covello claims C.O. Romero told him be expunged, dropped, or reinvestigated for independent reliability."

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[4] CDC Form 115 is used to report prisoners' rules violations. *See* DOM § 61020.7.

The first level response memorandum to this grievance, dated August 6, 1998, explained that Lira's appeal was denied because the three items used to validate Lira's status as a Northern Structure gang member "[met] the criteria for use in the validation process." The reviewer contacted Officer R. Romero to verify that the letter was authentic. The memorandum explained that the letter had no bearing on Lira's validation within the prison, as the letter "merely refer[red] to Merced County Sheriff's Department consideration for validation." The response also denied Lira's request to have the letter added to his C-File.

Lira's second level appeal was also denied, on September 21, 1998. The response memorandum agreed with the first level reviewer's conclusions that the documents used to validate Lira as a member of the Northern Structure gang were adequate. The second level reviewer also rejected Lira's argument that "the information utilized was not proven to be first-hand or hearsay and, therefore, d[id] not meet standards," and stated that "[a]ll nonconfidential information utilized by the SSU and [Institutional Gang Investigator] during the validation process was available and disclosed to the inmate prior to the inmate's classification appearances." Lira did not pursue this second grievance further.

He did, however, file a third grievance, on November 3, 1999, protesting, once again, his indeterminate administrative segregation placement. Under "Action Requested," Lira wrote: "(1) to immediately be released from this unjust indeterminate SHU placement. (2) to be given my day for day time credits good time work time. Under Pen.Code 2933 – Title 15 sec. 3043(c)." It appears that for

this grievance Lira completed only the first level of review, which was denied.

In March 2000, Lira, representing himself, filed suit in district court under 42 U.S.C. § 1983, alleging (1) that his validation as a Northern Structure gang member violated due process; (2) that the defendants exhibited deliberate indifference to his safety, in violation of the Eighth Amendment, by randomly assigning him a cellmate with no consideration of inmate compatibility; and (3) that he was denied his constitutional right of access to the courts. Ruling on a defense motion to dismiss, the district court dismissed the second and third claims for failure to state a claim.[5] Approximately one year later, ruling on a defense motion for summary judgment on the sole remaining cause of action, the court reasoned that because Lira failed to appeal his 1998 and 1999 grievances to the third level, he had not met the exhaustion requirement of 42 U.S.C. § 1997e(a). The court dismissed the entire case without prejudice.

DISCUSSION

Generally, "exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982). The PLRA, Pub.L. No. 104-134, § 803(d), 110 Stat. 1321-71 (1996), however, amended the Civil Rights jof Institutionalized Persons Act ("CRIPA"), Pub.L. No. 96-247, 94 Stat. 349 (1980), to create an exhaustion requirement for suits brought by prisoners under 42 U.S.C.

[5] The district court also denied the defendants' motion to dismiss Lira's claims as time-barred, a ruling that the defendants have not challenged before this court.

§ 1983 with respect to prison conditions. The amendment added by the PLRA states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

Lira recognizes that under § 1997e(a) only those aspects of his suit for which he completed all levels of the internal prison appeals process may go forward. Lira's objection is that the district court implemented this requirement by dismissing the entire action, without prejudice to refiling after exhaustion is completed. Defendants, in contrast, urge us to affirm the dismissal of Lira's entire case, because of his asserted failure completely to exhaust all of his claims before filing.[6]

The pivotal question is, consequently, a narrow one: Where a prisoner's complaint contains exhausted and unexhausted claims, need the district court dismiss the entire action, or may only the unexhausted claims or only the complaint be dismissed, in the last instance allowing the prisoner to seek leave to amend his complaint by excising the unexhausted claims?

As a preliminary matter, we take note of the crucial distinction between dismissing an action and dismissing a

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[6] Although defendants label the rule for which they argue as one of "total exhaustion," we use the term "total exhaustion dismissal." There is no dispute that the action must be "totally exhausted" in the sense that only exhausted claims can be litigated. The dispute concerns only whether the action must be dismissed and refiled if there are unexhausted claims included.

complaint. Dismissal of an entire *action* constitutes a final judgment by a district court. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (holding that "a plaintiff, who has been given leave to amend, may not file a notice of appeal simply because he does not choose to file an amended complaint," as appellate review is unavailable until a district court orders dismissal of an entire action). In contrast, when a district court dismisses a complaint for failure to state a claim, granting leave to amend the defective complaint is routine. If a plaintiff does not take advantage of the opportunity to fix his complaint, a district court may convert the dismissal of the complaint into dismissal of the entire action. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 992 (9th Cir. 1999) (holding that a district court that had granted leave to amend the complaint did not abuse its discretion by dismissing entire *action* when plaintiff failed to replace a defective complaint). Failure to grant leave to amend the complaint, however, "is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). This usual scheme applies in the prisoner civil rights litigation context. *See Lopez v. Smith*, 203 F.3d 1122, 1124 (9th Cir. 2000) (en banc) (holding that, when dismissal is appropriate under the PLRA's provisions allowing a district court to dismiss an *in forma pauperis* complaint "if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted," a district court retains discretion to decide whether a plaintiff may have leave to amend a complaint (quoting 28 U.S.C. § 1915(e)(2))).

The primary practical implications of requiring dismissal of the entire action, as urged by the defendants,

are: (1) limitations periods can run while cases are pending in federal court, possibly precluding refiling claims that were both exhausted and timely filed in court in the first instance; (2) a new filing fee may have to be paid; and (3) under the PLRA "strike" procedure, 28 U.S.C. § 1915(g), a prisoner who files three cases that are ultimately dismissed may not be able to proceed *in forma pauperis* in future cases.[7]

We are not the first circuit to consider this issue. The Second, Sixth, Eighth, and Tenth Circuits have all considered the same question, with conflicting results. *Compare Bey v. Johnson*, 407 F.3d 801, 809 (6th Cir. 2005) (holding that § 1997e(a) mandates dismissal of an entire action when a prisoner files a mixed complaint), *and Ross v. County of Bernalillo*, 365 F.3d 1181, 1182 (10th Cir. 2004) (holding that § 1997e(a) creates a total exhaustion-dismissal rule), *with Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir. 2004) (holding that § 1997e(a) is not a total exhaustion-dismissal rule), *and Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (8th Cir. 2003) (holding that § 1997e(a) requires dismissal of only the defective, mixed complaint rather than the entire action). After reviewing relevant

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[7] "'Strikes' are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed 'on the ground that [they were] frivolous, malicious, or fail[] to state a claim. . . . Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed" *in forma pauperis*. *Andrews v. King*, 398 F.3d 1113, 1116 n. 1 (9th Cir. 2005) (alterations in original). "[P]rior dismissals would qualify as strikes only if, after reviewing the orders dismissing those actions and other relevant information, the district court determined that they had been dismissed because they were frivolous, malicious or failed to state a claim." *Id.* at 1121. We have not yet decided whether a dismissed lawsuit can be "frivolous, malicious, or fails to state a claim," because of an exhaustion defect and have no occasion to do so here.

principles announced by the Supreme Court, the statutory language, and underlying policy considerations, we agree, with some caveats, that the Second Circuit's approach is appropriate, *see Ortiz*, 380 F.3d at 651, and hold that the "total exhaustion-dismissal" rule urged by defendants is not mandated by § 1997e(a).

I. The PLRA's Exhaustion Requirement

Section 1997e(a) specifies that "[n]o action shall be brought . . . until . . . available remedies are exhausted." 42 U.S.C. § 1997e(a). Under this provision, no claim may be pursued in court unless the prisoner has given the prison authorities an opportunity to consider providing some relief regarding the facts underlying the grievance. *See Booth v. Churner*, 532 U.S. 731, 736 (2001). That requirement necessarily applies to all claims alleged, as both parties recognize. Also, a district court must dismiss a case without prejudice "when there is no *presuit* exhaustion," even if there is exhaustion while suit is pending. *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (per curiam) (emphasis added).

The open question is whether a suit must be dismissed when there is presuit exhaustion of one or more of the claims contained in the complaint, or whether a different procedure is available to assure that only exhausted claims go forward. The defendants argue that the statutory text must be read to require dismissal without prejudice of cases in which there are "mixed" complaints, no matter the consequence for the prisoner's ability to pursue already exhausted claims. For several reasons, we do not agree.

The text of § 1997e(a) specifies a rule regarding the *instigation* of suit – that "[n]o action shall be brought"

unless there has been exhaustion. The statute does not prescribe the proper response by the district court if that requirement is not met. We have held that the phrase "[n]o action *shall be brought* "does not mean that we always must dismiss an action that does not comply with § 1997e(a). In *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), we held that § 1997e(a) is not a jurisdictional requirement that the plaintiff must plead and establish. Instead § 1997e(a) establishes an affirmative defense, waived if the defendant does not raise it. *Id.* at 1117-18 & n.9. *Wyatt* indicates that § 1997e(a)'s requirement regarding commencement of the action does not foreordain dismissal if not complied with.

Defendants' argument for a total exhaustion-dismissal rule must therefore rest on Congress's use of the word "action" in § 1997e(a). The argument is that where dismissal *is* appropriate, it is the entire action, not a part of it, that must be dismissed.

The term "action" is used throughout the statute. *See, e.g.*, § 1997e(c), (e). CRIPA, as amended by the PLRA, "like every Act of Congress, should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). To "adhere[] to the 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning,'" *id.* (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)), we consider similar uses of the term "action" in the statute, in particular § 1997e(c) and (e).

Unlike § 1997e(a), § 1997e(c) specifically covers "dismissals." The latter section provides:

> Dismissal.
>
> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

42 U.S.C. § 1997e(c).

In three respects, § 1997e(c) indicates that district courts need not dismiss an entire action because there is an unexhausted claim:

First, in § 1997e(c), Congress ordered dismissal of *certain* defective suits and claims – those that are "frivolous, malicious, fail[] to state a claim upon which relief can be granted, or seek[] monetary relief from a defendant who is immune from such relief," but did not specify that mixed actions must be dismissed. *See Ortiz*, 380 F.3d at 657 ("Section 1997e(c) . . . the place where we would expect to find guidance as to whether dismissal of 'mixed' actions is required[,] is silent on the issue."). This omission suggests that no special rule regarding the treatment of nonviable causes of action was intended.

Second, the reference to dismissal of a "claim" in § 1997e(c)(2) if there has been a failure to exhaust, juxtaposed to the reference to dismissal of an "action" in § 1997e(c)(1), indicates that claims that have not been exhausted can be treated independently, for dismissal purposes, from the action as a whole. There would be little point in providing for the dismissal of some nonexhausted claims on the merits if the remainder of the action would then have to be dismissed, although exhausted, because of the failure to exhaust the dismissed claims.[8]

Third, as Judge Clay persuasively explained in his dissent in *Bey*, interpreting the word "action" in § 1997e(a) and (c)(1) to indicate that an exhaustion defect in *any* claim infects the suit as a whole would "render [] subsection (c)(2) superfluous." *Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part). If § 1997e(a) demands a total exhaustion-dismissal rule because it uses the word "action," then § 1997e(c)(1), because it uses the word "action," must also require dismissal of the entire case if *any* claim is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." Yet, § 1997e(c)(1) must apply only when *all* the claims meet the statutory standard for summary dismissal on the merits, not when only some of them do. Otherwise, § 1997e(c)(2), contemplating the dismissal of individual frivolous "claims," would be unnecessary. The inclusion of a

[8] We note that the district court in this case followed this procedure, dismissing Lira's court access and Eighth Amendment claims from the complaint on the merits, before any exhaustion defense was considered.

single frivolous claim would contaminate the entire action, mandating dismissal under § 1997e(c)(1).[9]

To read the word "action" as used in § 1997e(c)(1) as precluding dismissal of individual defective claims would therefore clash with the "basic rule of [statutory] construction" requiring that we avoid interpreting a section of a statute in such a way that would make other sections become redundant. *Padash v. INS*, 358 F.3d 1161, 1170-71 (9th Cir. 2004). Consequently, we cannot attribute to the use of the term "action" in the PLRA the understanding that the entire case must be treated for dismissal purposes as a unitary whole if it contains both valid and invalid causes of action.

Another statutory provision reinforces this conclusion. Section 1997e(e) provides: "No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). A case under § 1997e(e) analogous to this one would be a "mixed" complaint alleging one claim for mental and emotional suffering not stemming from an underlying physical injury and a second claim not alleging mental or emotional injury, or alleging a claim for mental or emotional injury stemming from a physical injury. Under defendants' unitary approach to the term "action," dismissal of the entire case would be warranted.

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[9] We note as well that, even read independently, § 1997e(c)(1) mandates dismissal only if the action "fails to state *a* claim upon which relief can be granted." § 1997e(c)(1) (emphasis added). In other words, *one* viable claim is sufficient to avoid dismissal of the action.

In *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999), the Seventh Circuit rejected just that approach. Writing for the court, Judge Posner concluded that dismissal of the defective claim alone was "the natural reading of the statute, and there is no legislative history or other source of meaning to contradict the natural reading." *Id.* at 748. *Robinson* observed that,

> [t]o go further and dismiss the entire suit because it had one bad claim would be not only gratuitous, but also contrary to the fundamental procedural norm that when a complaint has both good and bad claims . . . only the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of that, and we find none.

Id. at 748-49. We agree with this reasoning and find it fully applicable to § 1997e(a).

In sum, the use of the term "action" elsewhere in the statute does not support interpreting § 1997e(a) as dictating a total exhaustion-dismissal rule. To the contrary, while "action" in the PLRA refers to the case as a whole, the statute consistently uses the term in a manner that contemplates dismissing the *entire* action only if the *entire* action fails to meet statutory standards. When some claims are valid and others are not, the usual procedural norm – that when a complaint has both good and bad claims, only the bad claims are "dismissed," *id.*, – prevails.

We regard these textual and structural considerations as dispositive. For that reason, any analogy to habeas corpus is unpersuasive. *Contra Ross*, 365 F.3d at 1189-90.

In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court mandated a rule requiring total exhaustion-dismissal for "mixed" habeas corpus petitions in many circumstances.[10] That decision, however, depended exclusively on policy considerations, because the applicable statute was not informative. *Id.* at 516-17 (analyzing "the policies underlying the statutory provision to determine its proper scope" when the text found to be ambiguous). Where, in contrast, the statutory language and structure answer an interpretation question, resorting to judicial evaluation of policy considerations is inappropriate. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

Even if we were to take policy considerations into account, those considerations support our rejection of a total exhaustion-dismissal rule. As noted above, in *McKinney*, we concluded that § 1997e(a) demands dismissal of cases in which there was no "presuit exhaustion," 311 F.3d at 1200, because a contrary result would mean that none of the benefits of the exhaustion requirement would be realized. This reading of the statute was appropriate despite the potential "expenditure of additional resources on the part of the parties and the court [because] it seem[ed] apparent that Congress has made a policy

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[10] Rose, however, does not necessarily require dismissal of the action, as opposed to the petition. *See Rose*, 455 U.S. at 520 (plurality) (noting that a petitioner "can always amend the petition to delete the unexhausted claims"). Also, as modified by the recent decision in *Rhines v. Weber*, 125 S.Ct. 1528 (2005), the *Rose* rule permits mixed petitions to be stayed rather than dismissed in the "limited circumstances" where a district court "determines there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.* at 1535; *see also Jackson v. Roe*, ___ F.3d ___, No. 02-56210, 2005 WL 2319679 (9th Cir. Sept. 23, 2005). Thus, the habeas corpus analogy does not support the inflexible total exhaustion-dismissal rule for which defendants argue.

judgment that this concern is outweighed by the advantages of requiring exhaustion prior to the filing of suit." *Id.*

Such balancing yields a different result in this case, because reading § 1997e(a) as a total exhaustion-dismissal rule would not advance the primary policy goals of the PLRA. As identified by the Supreme Court, those goals are to "reduce the quantity and improve the quality of prisoner suits," by filtering out frivolous claims, satisfying some grievances, and developing an administrative record for use in cases that do go forward. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

To dismiss an entire case that includes exhausted claims would do little to discourage piecemeal litigation. A prisoner who has filed an improper mixed complaint could often refile, including this time only the properly exhausted claims, while exhausting the remaining claims and filing another suit later. *See Bey*, 407 F.3d at 811-12 (Clay, J., concurring in part and dissenting in part); *Ortiz*, 380 F.3d at 658. Unlike for habeas corpus cases, *see* 28 U.S.C. § 2244(b), there is no preclusion on filing more than one PLRA suit. Also, PLRA causes of action joined in a single action may concern entirely independent underlying factual circumstances, so that ordinary rules of claim preclusion would not apply later. *See Headwaters, Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1051-52 (9th Cir. 2005). The result could be a new suit, essentially identical to the one dismissed, as the unexhausted claims would have dropped out early anyway. Such a requirement would promote the precise inefficiency the PLRA was designed to

avoid – requiring courts to docket, assign and process two cases where one would do.[11]

A total exhaustion-dismissal rule makes little practical sense in the context of § 1983 prison condition actions for another reason as well. The causes of action joined together in a single suit may have little to do with each other, temporally or substantively. In this case, for example, Lira included claims concerning asserted danger from other prisoners, claims concerning law library access, and claims concerning his assignment to administrative segregation and SHU. On defendants' submission, any one of these causes of action would have had to be dismissed even if fully exhausted, if another was not exhausted. Yet, exhausting one of these causes of action would not help to satisfy the plaintiff, weed out frivolous complaints, or develop an administrative record with respect to the other two, entirely separate matters. That is why, presumably, the district court was comfortable deciding the merits of two of the unexhausted claims before even considering the adequacy of exhaustion as to the third. *Cf. Ortiz*, 380 F.3d at 653 (disposing of plaintiff's supervisory liability claim before considering exhaustion issue with respect to underlying Eighth Amendment allegation). Moreover, if Lira had filed yet another grievance with regard to an allegedly unconstitutional condition of confinement, he could have filed a separate action regardless of the fate of this suit. Which claims are joined in a given PLRA lawsuit, in other words, is largely up to the plaintiff. As a result, the goal of avoiding piecemeal litigation is far less achievable than in

[11] Moreover, the PLRA's "three strikes" rule, 28 U.S.C. § 1915(g), already discourages multiple lawsuits. *See Bey*, 407 F.3d at 812 (Clay, J., concurring in part and dissenting in part).

the habeas context, where a single conviction is at issue and severe restrictions on second and successive petitions ordinarily require that all challenges to that conviction be joined in a single petition. *See* § 2244(b).

It is true, of course, as noted at the outset, that dismissal of the action for lack of total exhaustion could result in an inability to pursue the *exhausted* claim, because of a statute of limitations barrier or inability to pay a second filing fee. But imposition of such barriers with regard to properly brought claims runs the risk of precluding meritorious, fully exhausted claims so as to discourage the filing of nonmeritorious claims. Any disincentive would be more properly directed at discouraging the later refiling of the unexhausted claims – and, indeed, the "three strikes" provision to some degree serves that purpose, by requiring the payment of a filing fee if a prisoner repeatedly files frivolous suits.

In sum, with no danger that a prisoner can press forward in this suit with unexhausted claims, *see McKinney*, 311 F.3d at 1200, and thereby, in the words of the district court, use the exhaustion of one claim as a "hook to have many unexhausted claims considered in a federal civil rights action," adoption of a total exhaustion-dismissal rule would do nothing to advance Congress's policy goals. We conclude that the applicable policy considerations further buttress our determination that the text and structure of the PLRA demonstrates that Congress intended no special dismissal rules for § 1983 prisoner suits in addition to those spelled out in § 1997e(c).

II. Proper Disposition of Mixed Complaints

Having rejected defendants' suggestion that we adopt a total exhaustion-dismissal rule, we are left with a more discrete question: how *should* district courts proceed in cases in which the plaintiff has filed complaints with both exhausted and unexhausted claims?

In light of § 1997e(a)'s text and the policy rationales surrounding its adoption and application according to Ninth Circuit and Supreme Court law, we believe that a dual rule is appropriate. We hold that the proper treatment of a mixed complaint should depend on the relatedness of the claims contained within.

When a plaintiff has filed a "mixed" complaint and wishes to proceed with only the exhausted claims, a district court should simply dismiss the unexhausted claims when the unexhausted claims are not intertwined with the properly exhausted claims. This is likely to be the ordinary case in PLRA suits, where plaintiffs often raise several unrelated claims in a single lawsuit. *See Ortiz*, 380 F.3d at 661 (noting that § 1983 suits "routinely seek to address more than one grievance – sometimes a laundry list of grievances – relating to different events or circumstances"). Here, for example, Lira raised some issues that had nothing to do with his gang status or administrative segregation confinement. The district court addressed those issues on the merits and resolved them, considering the total exhaustion-dismissal rule only thereafter.

We note the contrast in this regard to cases in the habeas context. While habeas petitions may contain various claims that rest on different constitutional provisions, they all revolve around one incident: the defendant's conviction. *See Mayle v. Felix*, 125 S.Ct. 2562, 2570 (2005)

(holding that a claim arising out of the same trial or sentence is insufficient to meet Rule 15's same "conduct, transaction, or occurrence" test because "federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence"). This fact was of particular concern to the Supreme Court when it adopted a total exhaustion-dismissal rule for mixed habeas petitions in *Rose*. The Court noted that "[r]equiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims." *Rose*, 455 U.S. at 519, 102 S.Ct. 1198. This consideration is inapplicable when a prisoner's PLRA complaint contains markedly different claims. In that instance, a district court will be able to determine with relative ease which claims have been exhausted and which still need to be presented to prison officials. Under such circumstances, there will not often be any danger that an unexhausted claim will be implicitly decided while addressing an exhausted one.

On the other hand, when a plaintiff's "mixed" complaint includes exhausted and unexhausted claims that *are* closely related and difficult to untangle, dismissal of the defective complaint with leave to amend to allege only fully exhausted claims, is the proper approach. This is the procedure prescribed for mixed habeas petitions by the Supreme Court in *Rose*. Although *Rose* adopted a total exhaustion-dismissal rule, the Supreme Court, as noted, made clear that dismissal of an entire *action* is not always necessary. Instead, a petitioner should be allowed to "amend the petition to delete unexhausted claims, rather than returning to state court to exhaust all of his claims."

Id. at 520, 102 S.Ct. 1198 (plurality op.); *see also James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000) (noting that, after *Rose*, courts have long required only dismissal of a partially defective habeas petition, rather than of the entire case).[12]

Although we have noted that the analogy to habeas cases has limited applicability in the PLRA context, when a § 1983 suit contains interrelated claims, as habeas petitions invariably do, the concern regarding separating exhausted from unexhausted claims alluded to in *Rose* is relevant. For that reason, when a district court is faced with a mixed complaint containing claims that are closely related, the court should follow the approach set forth in *Rose* and its progeny: dismiss the complaint and allow the plaintiff the opportunity to amend his complaint to excise the unexhausted claims.

In following this procedure, we expect that district courts will exercise their usual discretion in granting leave to amend such defective complaints. *See* FED. R. CIV. P. 15(a); *Lopez*, 203 F.3d at 1130-31. We note, however, that "[l]eave to amend should be granted unless the pleading

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[12] The Supreme Court recently reaffirmed the *Rose* rule that a petitioner can always amend his petition "to delete the unexhausted claims." *Rhines v. Weber*, 125 S.Ct. 1528, 1535 (2005). A significant portion of the opinion in *Rhines* was devoted to analyzing how the one-year statute of limitations period applicable to habeas petitions could work in conjunction with the total exhaustion requirement to bar any relief. *Id.* at 1533-34. The opinion for the Court noted that "the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief," *id.* at 1535, thereby providing guidance to district courts to be especially mindful of timeliness concerns when dealing with attempts to amend mixed petitions.

'could not possibly be cured by the allegation of other facts,' and should be granted more liberally to pro se plaintiffs." *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) (quoting *Lopez*, 203 F.3d at 1130, 1131), *cert. denied*, 124 S.Ct. 2388 (2004).

III. Lira's Case

The resolution of this case thus largely boils down to a question of whether it will be the district court or the prisoner who excises the unexhausted claims, either through dismissal or amendment, respectively. The district court's dismissal of Lira's case turned on its implicit, but not fully discussed, interpretation of Lira's complaint as presenting *multiple* claims regarding his validation as a Northern Structure gang member. It correlated the number of grievances filed within the California prison system with the number of claims within his complaint, and therefore did not regard his complaint as presenting a single due process claim challenging the unavailability of the evidence used against him and resulting in his placement and retention in administrative segregation.

Lira has argued to this court, having received counsel since his last appearance in district court, that his complaint actually presents "a constellation of due process violations for his validation as a gang associate and his placement and retention in the administrative segregation at [DVI] and the SHU at Pelican Bay" that amounted to a *single*, exhausted claim.[13] Given that the district court

[13] Although we recognize that there is force to Lira's argument, we leave it to the district court to consider this new characterization of Lira's due process claim in the first instance.

considered Lira's case under the misapprehension that dismissal of the entire *action* was mandated if the complaint was partially defective, we remand to the district court for further proceedings. If the district judge again determines that Lira's due process claim consists of both exhausted and unexhausted claims that are intertwined, the proper course of action is for the district court (1) to allow Lira to amend his complaint so that it refers to only his fully exhausted 1996 grievance, and (2) to consider, on the merits, whether Lira states a viable due process claim on the basis of his fully exhausted 1996 grievance.

REVERSED AND REMANDED.

2002 WL 1034043 (N.D.Cal.)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ERNESTO G. LIRA,

Plaintiff,

v.

DIRECTOR OF CORRECTIONS OF THE STATE OF CALIFORNIA; et al.,

Defendants. /

No. C 00-905 SI (pr)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed May 17, 2002)

INTRODUCTION

Ernesto G. Lira, an inmate currently housed at Pelican Bay State Prison, filed this *pro se* civil rights action under 42 U.S.C. § 1983. Defendants now move for judgment on the pleadings or, alternatively, for summary judgment and Lira opposes the motion. The court finds no triable issues of material fact exist and defendants are entitled to judgment as a matter of law. The court therefore will grant defendants' motion for summary judgment. The court also considers and denies plaintiff's motion for appointment of counsel.

BACKGROUND

Lira's complaint alleges that his due process rights were violated when he was labeled a gang associate and placed in administrative segregation ("ad seg") because there was not sufficient reliable evidence to support the decision. His complaint also alleges that his due process rights were violated at the many periodic reviews that

have occurred since his original placement in ad seg. The following facts are undisputed, unless otherwise noted.

On December 28, 1995, while he was housed at Deuel Vocational Institute ("Deuel"), Lira received a California Department of Corrections form "Order And Hearing For Placement In Segregated Housing." In the order, correctional lieutenant Olmstead wrote that he had been informed by the investigative services unit that Lira was "a validated Northern Structure associate. Per the aforementioned, your continued presence in the RC/GP poses a threat to the safety of staff and inmates alike, and to the security of this facility." Plaintiff's Declaration In Support Of Motion In Opposition To Defendants' Motion For Judgment On The Pleadings Or Alternatively, Motion For Summary Judgment ("Lira Decl."), Exh. 5. Lieutenant Olmstead ordered Lira into ad seg "pending review/ evaluation of case factors." *Id.* Lira checked the box on the Segregated Housing Order form that stated "I understand that I have a right to a hearing concerning my placement in segregated housing and I hereby waive that right." *Id.*, part III. On January 4, 1996, Lira appeared before the Deuel institutional classification committee for the initial review of his placement in ad seg. The committee elected to retain him in ad seg pending review of his prison gang membership. Lira has remained in ad seg since then, although now he is housed in ad seg at Pelican Bay State Prison, to which he was transferred in September 1996.[1]

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[1] Defendants filed two exhibits under seal with their motion for summary judgment. The exhibits were memoranda documenting information received from inmates who told prison staff details about prison gang activities and membership. The court granted defendants' request for *in camera* review of confidential documents used to determine that Lira was affiliated with NS. Lira objected to the filing of the

(Continued on following page)

Lira received many periodic reviews of his retention in ad seg since 1995, but none of those periodic reviews has resulted in his removal from ad seg.

Lira filed an inmate grievance concerning his placement in ad seg. In his grievance filed on July 29, 1996, Lira described his problem: "The following is my appeal for this lock up order '114D' dated 12-28-95 and the so call validation chronos being used." Lira Decl., Exh. 1, p. 1 (spelling as in original). In the "action requested" portion of the form, he wrote "# 1. To be released from ad./seg. and returned to G./P, # 2 Remove all these 128-B from my C.D.C. file. # 3. Be given a program and left alone to do my time, Im to old to play games, never have." *Id.* (spelling and grammar as in original). By the time the appeal reached the director's level, the issue was described by the reviewer as "[w]hether or not the institution's denial of appellant's request to release him to the general population and remove all gang related information from his Central File (C-File) is appropriate." Lira Decl., Exh. 1, Director's Level Review dated January 24, 1997, p. 1. The director's level decision denied the appeal. *Id.*

Lira filed other inmate grievances, but never appealed them to the director's level of review.

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documents under seal and the *in camera* review procedure at the time he filed his opposition to defendants' motion for summary judgment. The court has considered Lira's arguments and rejects his request to make the sealed documents available to him. Defendants have adequately shown that confidential information in the documents, if disclosed, would create a risk to the safety of other prisoners and the institution.

VENUE AND JURISDICTION

Venue is proper in the Northern District of California under 28 U .S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims occurred at Pelican Bay State Prison in Del Norte County, which is located within the Northern District. This court has federal question jurisdiction over this action brought under 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Defendants have moved for summary judgment on the affirmative defense that Lira failed to exhaust administrative remedies before filing this action. *See Wyatt v. Terhune*, 280 F.3d 1244, 1245. Where, as here, the moving party bears the burden of proof at trial, he must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontroverted at trial. *See Houghton v. Smith*, 965 F.2d 1532, 1536 (9th Cir. 1992). He must establish the absence of a genuine issue of fact on each issue material to his affirmative defense. *Id.* at 1537; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a fact is material if it might affect the outcome of the suit under governing law, and a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.") Once the moving party has come forward with this evidence, the burden shifts to the non-movant to set forth specific facts showing the existence of a genuine issue of fact on the defense.

A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is based on personal knowledge and sets forth specific facts admissible in

evidence. *See Schroeder v. McDonald*, 55 F.3d 454, 460 & nn. 10-11 (9th Cir. 1995) (treating plaintiff's verified complaint as opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746, plaintiff stated under penalty of perjury that contents were true and correct, and allegations were not based purely on his belief but on his personal knowledge).

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The evidence must be viewed in the light most favorable to the nonmoving party and the inferences must be drawn in the light most favorable to the nonmoving party. *See id.* at 630-31.

DISCUSSION

A. *Exhaustion*

The Prison Litigation Reform Act of 1995, Pub.L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Even if an inmate seeks only money damages, he must complete the prison administrative grievance process that can provide some sort of relief on

the complaint stated. *See Booth v. Churner*, 532 U.S. 731, 739-41 (2001).[2]

The State of California provides its inmates and parolees the right to appeal administratively "any departmental decision, action, condition or policy perceived by those individuals as adversely affecting their welfare." *See* Cal.Code Regs. tit. 15, § 3084.1(a). In order to exhaust available administrative remedies within this system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director of the California Department of Corrections. *See id.* § 3084.5; *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). Some relief is available under the California prison administrative grievance system for aggrieved prisoners.

The exhaustion requirement applies to all claims in a complaint; it is not enough to exhaust administrative remedies as to one claim and then use that exhaustion as a jurisdictional hook to have many unexhausted claims considered in a federal civil rights action. "When multiple prison condition claims have been joined, as in this case, the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of

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[2] Even though *Booth* was decided after Lira filed this action, it applies to him. When the Supreme Court applies a rule of federal law to the parties before it, as it did in *Booth*, that rule is the controlling interpretation of federal law and must be given full effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94-99 (1993).

the claims." *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000); *Rivera v. Whitman*, 161 F. Supp. 2d 337, 340-43 (D. N.J. 2001) (dismissing without prejudice § 1983 prisoner action containing exhausted and unexhausted claims because plain language of § 1997e(a), as well as the legislative intent and policy interests behind it, compel a "total exhaustion" rule). *But see Johnson v. True*, 125 F. Supp. 2d 186, 188 (W.D. Va. 2000).

It is undisputed that Lira only filed a director's level appeal and received a response thereto on his 1996 administrative grievance; he did not do so for any other grievance. Because Lira only exhausted administrative remedies as to the 1996 administrative grievance, the scope of the 1996 administrative grievance must be determined. Lira defined the scope of the 1996 administrative grievance when he wrote that he was appealing "this lock up order '114D' dated 12-28-95 and the so call validation chronos being used." Lira Decl., Exh. 1, p. 1 (spelling as in original). He wrote that he wanted to be released from ad seg to the general prison population and to have erroneous CDC-128 chronos expunged from his file. *Id.* Lira did not directly challenge any of the periodic reviews that had occurred up until that date. His grievance was limited to his placement in ad seg.

Lira's 1996 administrative grievance did not challenge the propriety of any of the periodic reviews that occurred after the grievance was filed. Those later periodic reviews – conducted by many different defendants – form the basis for portions of his due process claim in this action. His complaint in this action claims he was denied due process in the original decision to place him in ad seg, as well as at the periodic reviews that occurred in 1996 through 1999. Complaint, p. 60 (alleging that defendants violated Lira's

right to due process in that they (1) placed him in ad seg wrongfully, (2) failed to give him an opportunity to be heard, and (3) "failed to provide meaningful 120 day classification reviews"). Most of the periodic reviews occurred at Pelican Bay, after his transfer there in September 1996. *See* Complaint, ¶¶ 12-32. For example, Lira alleges that he received his initial review at Pelican Bay on September 27, 1996 by defendants Stokes, Bolles, and Heaps, *see* Complaint, ¶ 13. He does not allege that those defendants did anything wrongful before that date, yet his 1996 administrative grievance predates that initial review and could not have exhausted a later-arising claim. These defendants (and many other defendants) are named as defendants and have liability exposure only because of their alleged denial of due process to Lira when they conducted periodic reviews.[3] On the undisputed fact that only the 1996 administrative grievance was exhausted, the court concludes that Lira has not exhausted his claims that he was denied due process during the later periodic reviews.

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[3] The periodic reviews are not simply an opportunity for a committee to revisit and decide anew whether an inmate's original placement was correct; their purpose is to consider whether the inmate should remain in ad seg. With this different purpose, the defendants who conduct periodic reviews could have liability wholly separate from that of the defendants who make the original decision to place an inmate in ad seg. For example, if an inmate was placed in ad seg on information that was deemed reliable in 1995, but something happened in 1997 to undermine the reliability of the information (e.g., the informants who identified the inmate as a prison gang member, recanted, and said they had framed him), there would have been sufficient evidence to support the original decision, but not to support the continued retention in ad seg after the 1997 evidentiary problem arose. Persons who conducted periodic reviews thereafter and decided that the wrongly accused inmate should remain in ad seg without any evidence to support his retention there could be liable for a due process violation.

Lira argues that he "would have been precluded from raising and/or submitting the same issue that was previously adjudicated at the director's level review" in the appeal of his 1996 grievance. Opposition, p. 17. That may be true, but it is irrelevant: the later periodic reviews of his ad seg housing were not within the scope of the 1996 grievance and appeal. Lira has not presented any evidence to support his speculation that a later grievance on separate allegedly wrongful acts – i.e., the later periodic reviews – would have been barred by the grievance challenging his original wrongful placement in ad seg. In fact, Lira did file grievances after his 1996 administrative grievance and those later grievances were not rejected as repetitive. *See* Lira Decl., Exhs. 2 and 3.

Lira also argues that exhaustion was not required because damages were not available for a claim such as his. This argument is unpersuasive. Exhaustion of all "available" remedies is mandatory; those remedies need not meet federal standards, nor must they be "plain, speedy and effective." *Porter v. Nussle*, 122 S.Ct. 983, 988 (2002); *Booth v. Churner*, 532 U.S. at 739-40 & n.5. Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. *Id.* at 741. A prisoner "seeking only money damages must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money." *Id.* at 734. That the administrative procedure cannot result in the particular form of relief requested by the prisoner does not excuse exhaustion because some sort of relief or responsive action may result from the grievance. *See id.* at 736-41; *see also Porter*, 122 S.Ct. at 988 (purposes of exhaustion requirement include allowing prison to take responsive action,

filtering out frivolous cases, and creating administrative records).

Several of defendants' arguments also do not persuade the court. First, defendants' argument that Lira did not exhaust his claim for monetary relief because he did not seek monetary relief in his administrative grievance is unpersuasive because the Supreme Court specifically rejected this construction of § 1997e(a) in *Booth*, 532 U.S. at 739: "one 'exhausts' processes, not forms of relief." Second, defendants' argument that Lira must exhaust by filing a grievance naming the specific persons he ultimately seeks to sue goes too far, as an inmate may not know all the names of the defendants until after he files a civil action and conducts discovery, in which case, he would have to dismiss his action and file anew under defendants' reasoning. Finally, the court rejects the notion that the PLRA exhaustion requirement should be treated similarly to the habeas exhaustion requirement. The comity interest, the abuse of the writ doctrine, and the successive petition rules that support the habeas exhaustion requirement simply are not present in non-habeas actions such as this.

Defendants have established the absence of a genuine issue of fact on the administrative exhaustion defense. Lira did not pursue his administrative grievance to the highest level available under the prison administrative grievance and appeal system for all his claims *before* filing this action as required by 42 U.S.C. § 1997e(a). The plain language of § 1997e(a) makes exhaustion a precondition to filing in federal court: "No action shall be brought . . . until such administrative remedies as are available are exhausted." Even viewing the evidence in the light most favorable to Lira and drawing the inferences therefrom in

his favor, no reasonable jury could return a verdict in favor of Lira and against any defendant. Defendants are entitled to summary judgment.

This action is being decided on the summary judgment motion rather than the motion for judgment on the pleadings because it is necessary to go beyond the pleadings to consider the parties' evidence regarding the exhaustion of administrative remedies. Because defendants prevail on their threshold argument that Lira did not exhaust before filing this action, the court will not proceed to decide the other issues raised by defendants but will wait until if and when plaintiff files a new action containing after he exhausts his administrative remedies.

B. *Lira's Motion For Appointment Of Counsel*

Lira has moved for the appointment of counsel to represent him in this action. A district court has the discretion under 28 U.S.C. § 1915(e)(1) to designate counsel to represent an indigent civil litigant in exceptional circumstances. This requires an evaluation of both the likelihood of success on the merits and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the legal issues involved. *See Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Neither of these factors is dispositive and both must be viewed together before deciding on a request for counsel under section 1915(e)(1).

Here, exceptional circumstances requiring the appointment of counsel are not evident. Based on the record before it, there is no likelihood of success on the merits because Lira did not exhaust his administrative remedies. The complaint also does not raise particularly difficult

legal claims. Lira's motion for appointment of counsel therefore is DENIED.

CONCLUSION

Defendants' motion for summary judgment is GRANTED (Docket # 43). Judgment will be entered in defendants' favor and against plaintiff. The decision in this action does not forever terminate Lira's ability to seek redress for the wrongs he allegedly suffered. Lira may return to court to file a new action and pursue his legal remedies if he ever exhausts his administrative remedies.

Plaintiff's motion for appointment of counsel is DENIED. (Docket # 57.)

The clerk shall close the file.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERNESTO G. LIRA,

Plaintiff,

v.

DIRECTOR OF CORRECTIONS OF THE STATE OF CALIFORNIA; et al.,

Defendants. /

No. C 00-905 SI (pr)

JUDGMENT

(Filed May 17, 2002)

This action is dismissed without prejudice because plaintiff did not exhaust his administrative remedies before filing the complaint.

IT IS SO ORDERED AND ADJUDGED.

Dated: May 16, 2002 /s/ Susan Illston
SUSAN ILLSTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNESTO G. LIRA,

Plaintiff-Appellant,

v.

L.T. HERRERA; M. PILAND; J. BRIDDLE; A. SCRIBNER; J. STOKES; B. HEAPS, K. CRUSE; BRUCE, FIELDER; M. NIMROD; K. MANN; D. BEST; C. PATTEN; D. BRADBURY; K.C. BOLLES; EDWARD ALAMEID; Asst. Warden BUSSER,

Defendants-Appellees.

No. 02-16325

D.C. No. CV-00-00905-SI
Northern District of California, San Francisco

ORDER

(Filed Dec. 13, 2005)

Before: REINHARDT, THOMPSON, and BERZON, Circuit Judges.

Judges Reinhardt and Berzon have voted to deny the petition for rehearing en banc, and Judge Thompson so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. *See* FED. R. APP. P. 35.

The petition for rehearing en banc is therefore **DENIED**.